BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL BUCK Claimant VS. **CUSTOM ROOFING** Respondent AND **NATIONAL SURETY CORP.,** Insurance Carrier	)	Docket No. 199,552

ORDER

Respondent appeals from a Preliminary Hearing Order of June 12, 1995, wherein Administrative Law Judge Shannon S. Krysl granted claimant benefits finding that although claimant was negligent in failing to wear a safety belt, his actions fell short of willfulness.

ISSUES

(1) Whether the claimant's accidental injury arose out of and in the course of his employment on March 8, 1995.
(2) Whether claimant's claim should be disallowed due to his willful failure to use a guard or protection in violation of K.S.A. 44-501(d)(1).
(3) Whether the Administrative Law Judge exceeded her jurisdiction in failing to grant claimant's request that the Administrative Law Judge's order for temporary total disability be modified to read, "from the date of injury to release by Dr. Estivo."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented, for purpose of preliminary hearing the Appeals Board finds as follows:

K.S.A. 44-534a lists specific issues which can be appealed from preliminary hearing to the Appeals Board. A finding dealing with whether claimant suffered accidental injury arising out of and in the course of his employment and a finding dealing with claimant's

willful failure to use a safety guard would be specifically appealable under the Kansas Workers Compensation Act. See K.S.A. 44-534a.

Claimant's request for a modification of temporary total disability would not be appealable to the Appeals Board from a Preliminary Hearing Order, pursuant to either K.S.A. 44-534a or K.S.A. 44-551, and said issue will not be considered in this Order.

Claimant alleges accidental injury to his foot and ankle on March 8, 1995, when he fell from a roof while working for the respondent.

Respondent does not contest the fact that claimant fell and injured himself on the date alleged. The respondent contends claimant's failure to wear his safety belt provided by the respondent at the time claimant was injured is justification for a denial of benefits. The Appeals Board finds, in line with the uncontroverted evidence, that claimant did suffer accidental injury arising out of and in the course of his employment on the date alleged. The Appeals Board must next take up the issue of whether claimant's failure to wear his safety belt is sufficient to disallow benefits.

Claimant does not deny that he was provided the safety belt by respondent when he began his employment. He also does not deny being told that failure to wear the safety belt would result in his termination. Claimant contends that on the date of injury only four (4) belts were available for five (5) employees working on the roof. Claimant testified that he gave up his belt to a less experienced worker in order to provide the less experienced worker more protection from risk of injury.

Respondent contests this testimony. Mr. Kevin Morris, the owner of Custom Roofing, testified that pursuant to OSHA regulations every employee who, at any time, would be on a roof, was issued a safety belt and was required to wear the safety belt on the job. On the date of claimant's injury, Mr. Morris testified that all five (5) employees at the job site had their own individual safety belts and claimant's contention that there were only four (4) belts for five (5) employees is incorrect. Respondent further testified that claimant had been fully oriented in the use of the safety belt and had been advised on more than one (1) occasion of the requirement that the belt be worn at all times while on a roof. Claimant admits to having been told on two (2) occasions of the safety belt requirements, with the respondent contending claimant had been told as many as ten (10) times. Respondent acknowledges he at no time observed claimant not wearing his belt on the job site which is an indication claimant was fully aware of the safety rules in existence on respondent's work sites.

Claimant's testimony is further contradicted by Ms. Dana Davis. Ms. Davis was a full-time secretary/receptionist on the date of injury. She testified that Mr. Morris, the owner of respondent Custom Roofing, was very strict regarding the use of safety belts as failure to provide and use safety belts on the job could result in as much as a seven thousand dollar ($7,000) per incident fine through OSHA. She also testified to having overheard a conversation between the claimant and his girlfriend, wherein it was stated that claimant felt that wearing the safety belt was “dorky,” and as a result claimant would not wear the belt on a regular basis. This testimony is supported by Mr. Morris who overheard the claimant and his girlfriend discussing the use of the belt subsequent to the date of injury, with the girlfriend saying the claimant looked “corny” when he wore the belt.

The most devastating testimony contradicting claimant's claim, comes from Mr. Murl Brown, a shingler working for respondent at the time of the injury. Mr. Brown had no supervisory powers over claimant or his brother, John Buck, also a shingler at the job site. Mr. Brown testified that, on the date of injury, both claimant and his brother hooked the belts up to cleats in the roof and had the safety belts available so that if Mr. Morris, the owner, appeared they could very quickly put the belts on, thus creating the impression that they were wearing the safety belts. When Mr. Morris was not at the job site, neither the claimant nor his brother wore the belts.

On the date of claimant's accident, John Buck, claimant's brother, fell from the same roof as claimant with the only exception being that John Buck fell off the roof at a spot where the ground was considerably closer to the edge of the roof, thus escaping injury. Both claimant and John Buck laughed about the incident and continued to work on the roof without use of their safety belts. When claimant fell from the roof, he fell at a location where the roof was considerably higher from the ground, thus resulting in claimant's injury.

Mr. Brown testified that each person at the job site that day had his own safety belt available, and that of the five (5) people at the job site, only claimant, claimant's brother and Mr. Brown were on the roof on a regular basis. Two (2) other employees at the job site, Mr. Chris Cooper and Mr. Mike Miller, were not scheduled to be on the roof but were instead assigned the job of ground clean-up. Mr. Brown did state that Mr. Cooper came onto the roof for a short period of time at Mr. Brown's request but that Mr. Cooper had his own belt on at the time. Mr. Miller, Mr. Brown's brother, at no time was allowed on the roof due to Mr. Brown's concern that Mr. Miller was not experienced enough to do the roof work.

It is also significant that it had snowed the day before and the roof was slicker than usual, creating additional hazard and additional need for safety belts.

Claimant admits that, had he been wearing the safety belt, he would not have fallen from the roof and the injury would not have occurred. Mr. Brown also testified that had claimant been wearing his safety belt on the date of accident, the injury would not have occurred.

K.S.A. 44-501 states in part:

> "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.
>
> "(d)(1) If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed."

In this instance claimant had been fully oriented in the required use of the safety belt with the employer instructing claimant, on at least two (2) separate occasions, of the

importance and necessity that the belt be worn. The failure or refusal to use the belt would result in termination of the employee. The fact the claimant was aware of this is emphasized by the theatrics displayed by claimant and his brother at the work site wherein they would hook the belts up and have them available should the owner appear. If the owner was not present, the belts would lie on the roof unused. This evidence, coupled with claimant's admission that had he been wearing the belt on the date of injury he would not have suffered injury, causes the Appeals Board grave concern regarding claimant's failure and refusal to wear this safety device, which is required by OSHA regulations, and was voluntarily furnished by the employer.

Willful failure to use a safety device has been very strictly construed in Kansas. In Bersch v. Morris & Co., 106 Kan. 800, 189 P. 934 (1920), the Court defined willful as including ". . . the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . 'Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.'" In this case the Appeals Board finds not only were claimant's actions intractable and headstrong, but also deceitful.

To be provided a safety device specifically intended to protect one's welfare and to refuse to use that safety device, going to the extent of intentionally misleading one's employer, constitutes appropriate grounds for a disallowance of benefits resulting from the injury in question.

The Appeals Board finds claimant's activities on March 8, 1995, to have been deliberate, willful and intentional, and, as such, claimant's claim for benefits resulting from said injury shall be disallowed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of June 12, 1995, of Administrative Law Judge Shannon S. Krysl, shall be and is reversed, and claimant is denied benefits for the injuries suffered thereon.

IT IS SO ORDERED.

Dated this ____ day of September, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Brian D. Pistotnik, Wichita, Kansas
Gary A. Winfrey, Wichita, Kansas
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director